

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

In the Matter of )

Rulemaking to Amend Parts 1, 2, 21, and 25 )  
 of the Commission's Rules to Redesignate )  
 the 27.5-29.5 GHz Frequency Band, to )  
 Reallocate the 29.5-30.0 GHz Frequency Band, )  
 to Establish Rules and Policies for Local )  
 Multipoint Distribution Service and for )  
 Fixed Satellite Services )

Assignment of Orbital Locations )  
 to Space Stations in the Ka-band )

CC Docket No. 92-297

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**OPPOSITION TO PETITION FOR EXPEDITED ACTION**

**KASTAR SATELLITE COMMUNICATIONS CORP.**  
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**KASTAR 73 ACQUISITION, LLC**

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## Summary

KaStar Satellite Communications Corp. and its wholly-owned subsidiaries, KaStar 109.2 Acquisition, LLC and KaStar 73 Acquisition, LLC (collectively, the "KaStar Companies"), hereby oppose Part I of the Petition for Expedited Action ("Petition") filed by Pegasus Development Corporation ("Pegasus"). For the reasons discussed in the Opposition, the Petition is procedurally defective and substantively without merit, and should be summarily dismissed.

Procedurally, the Petition seeks to re-open a rule making proceeding that concluded more than seventeen months ago and impose new, more stringent requirements on the first-round Ka-band licensees. The appropriate vehicle for Pegasus' proposals would have been either a petition for reconsideration of the *Third Report and Order* or a petition for rule making. In either case, Pegasus cannot, in the pleading it filed, attempt to vitiate the valid rights of the first-round licensees and undermine the rules and policies upon which they reasonably rely.

Substantively, Pegasus' Petition is based on the unsupportable conclusion that the first-round licensees are warehousing spectrum such that the adoption of more stringent rules on international coordination and milestones is necessary. This predicate is belied by the facts, which demonstrate the substantial efforts that the KaStar Companies have undertaken to design, finance and construct the satellite system and the active participation of the KaStar Companies on international coordination issues and in rule making proceedings. The KaStar Companies are obligated by the terms of the *KaStar Authorization* to coordinate with foreign administrations and licensees, and face the potential for license forfeiture if not successful. Further, there is no reason to modify the milestone schedule where there is no evidence that existing rules are inadequate to police non-compliance. Simply stated, Pegasus proposes solutions where there is no problem.

For these reasons, the Pegasus Petition should be dismissed.

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Rules and Policies for Local Multipoint	)	
Distribution Service and for Fixed Satellite	)	
Services	)	
	)	
Assignment of Orbital Locations to Space Stations	)	
in the Ka-band	)	

To: The Commission

**OPPOSITION TO PETITION FOR EXPEDITED ACTION**

KaStar Satellite Communications Corp. ("KaStar") and its wholly-owned subsidiaries KaStar 109.2 Acquisition, LLC and KaStar 73 Acquisition, LLC (collectively, the KaStar Companies"), by counsel and pursuant to Section 1.45(b) of the Commission's Rules, hereby oppose certain proposals set forth in Part I of the Petition for Expedited Action ("Petition") filed by Pegasus Development Corporation ("Pegasus") on May 21, 1999.<sup>1</sup> As discussed herein, Pegasus' Petition is procedurally defective and should be dismissed. Assuming *arguendo* that the Commission considers the Petition, adoption of the proposals advocated by Pegasus would unfairly disturb the valid rights of the KaStar Companies and other first-round Ka-band licensees, and must therefore be rejected.

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<sup>1</sup> By *Order and Authorization*, DA 97-972, released May 9, 1997 (the "*KaStar Authorization*"), KaStar was granted an authorization to launch and operate Ka-band satellites at 109.2° W.L. and 73° W.L. The authorization for 109.2° W.L. ultimately was transferred to KaStar 109.2 Acquisition, LLC and the authorization for 73° W.L. ultimately was transferred to KaStar 73 Acquisition, LLC.

## Introduction

On May 9, 1997, the Commission granted KaStar's application to provide Ka-band satellite services at orbital locations 109.2° W.L. and 73° W.L., both of which can provide full-CONUS coverage.<sup>2</sup> In granting the application, the Commission, among other things, required KaStar to demonstrate compliance with rules later adopted in the *Third Report and Order*,<sup>3</sup> coordinate with U.S. government systems and undertake international interference coordination. The Commission did not, however, impose an implementation milestone schedule on KaStar, indicating the Commission would first need to allocate spectrum for inter-satellite links ("ISLs").<sup>4</sup>

Since the grant of the *KaStar Authorization*, the KaStar Companies have been making great strides toward the construction, launch and operations of its satellite systems, to-wit:

- Executed a contract with a major satellite construction company for the construction of two Ka-band satellites;<sup>5</sup>
- Executed a contract with a major vendor to supply the payload;
- Obtained financing in the amount of \$15.8 million from strategic partners, lenders and venture capital firms to fund construction and operation; and

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<sup>2</sup> See *KaStar Authorization* at 11-13.

<sup>3</sup> See *Third Report and Order*, 9 CR 1214 (1997) ("*Third Report and Order*").

<sup>4</sup> See *KaStar Authorization* at 9. See also *Third Report and Order* at 1227 ("because licensees will not be able to proceed beyond the initial stages of construction until the inter-satellite link issues are resolved, we did not impose any system implementation milestones until we grant authority to launch and operate individual systems using specific inter-satellite link spectrum.") As Pegasus observes, on October 9, 1998, KaStar and other similarly-situated licensees, in response to a Commission request, filed reports with the FCC describing their proposed ISL operations and frequency plan. See Pegasus Petition at 5, n.13. No action has been taken with respect to those reports.

<sup>5</sup> See KaStar's 1998 annual report filed June 26, 1998 pursuant to Section 25.145(g).

- Continues to meet with other financing sources and service providers to obtain additional financing.

In addition, KaStar has actively participated in the 18/28 GHz proceeding<sup>6</sup> and blanket licensing working groups, undertaken efforts to coordinate with foreign administrations and licensees, filed a petition for rulemaking to allocate spectrum for tracking, telemetry and control ("TT&C")<sup>7</sup> and filed its report with the Commission to secure ISL spectrum.

On October 15, 1997, the Commission released its *Third Report and Order* amending certain licensing and technical rules for Ka-band fixed satellite systems. These rules became effective on January 20, 1998.

### **Discussion**

In its Petition, filed more than seventeen months after the adoption of the *Third Report and Order*, Pegasus now seeks to impose new and onerous requirements on the KaStar Companies and the other first-round Ka-band licensees. While proposing to seek "expedited action" in some unspecified proceeding, the Petition essentially is an untimely petition for reconsideration of the *Third Report and Order* and a misplaced petition for rulemaking, and should be summarily dismissed. Insofar as the Commission considers the substance of Pegasus' Petition, it is abundantly clear that Pegasus proposes to single out unfairly the KaStar Companies and other first-round licensees with far-flung notions that are contrary to the public interest and which would effectively vitiate the rules and policies upon which these licensees reasonably rely. Simply put,

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<sup>6</sup> See, e.g., Comments of KaStar filed November 19, 1998 and Reply Comments filed December 21, 1998.

<sup>7</sup> KaStar, along with other first-round licensees, jointly filed a petition for rulemaking on August 7, 1997 to allot spectrum in the 3600-3700 MHz and 6425-6525 MHz for TT&C.

Pegasus wants to change the rules in the middle of the game. In particular, as discussed below, it would be unfair and unduly burdensome for the Commission to now declare that first-round licensees that are "unable" to complete international coordination will lose their priority over second-round applicants or second-round licensees.<sup>8</sup> Likewise, for the reasons explained in the *Third Report and Order*, Pegasus' argument that the Commission should impose new, more stringent milestone requirements on Ka-band licensees must be rejected.

**I THE PETITION IS PROCEDURALLY DEFECTIVE AND SHOULD BE SUMMARILY DISMISSED.**

Though styled as a "Petition for Expedited Action," the Pegasus Petition bears the caption of the docket proceeding for the *Third Report and Order*. Stripped of its veneer, however, the Petition is, in actuality, a transparent attempt by a second-round applicant to reopen a rulemaking proceeding concluded seventeen months ago in order to unfairly prejudice only the valid rights of the KaStar Companies and other first-round licensees that are entitled to rely and have relied on the Commission's rules. Apparently, Pegasus expects the first-round licensees that are constructing their satellite systems to pay the price for Pegasus' own failure to participate timely in either the *Third Report and Order* or the first-round proceeding. On this basis alone, the Petition should be summarily dismissed.

Moreover, the entire Petition is predicated on the false premise that the first-round licensees are warehousing spectrum, concluding that "it is apparent that the vast majority of [Ka-band] systems are languishing."<sup>9</sup> Pegasus offers no documentation whatsoever to support this

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<sup>8</sup> Pegasus Petition at 14.

<sup>9</sup> *Id.* at 9.

view, instead relying on speculation and surmise. As stated above, the KaStar Companies are actively involved in all phases of designing, financing and constructing its satellite system and securing spectrum to achieve its business objectives, notwithstanding the absence of a milestone schedule.

As demonstrated below, each of the proposals discussed in Part I of the Pegasus Petition are procedurally defective and should not be considered as part of the captioned proceeding or in the context of the second-round applications.

*Restrictions on Orbital Locations.* Pegasus first argues that the Commission should strictly apply and, in fact change, the provisions of Section 25.140(f), which prevents orbital location assignments to a licensee that already has three or more "unused" orbital locations in the Ka-band. Pegasus proposes that this rule should be applied to second-round applicants that also have secured full-CONUS licenses in the first-round. Pegasus characterizes this initiative as "an important step" in resolving the contested orbital locations among the second-round Ka-band applicants.<sup>10</sup>

Pegasus has chosen the wrong forum to make this argument. Such a fundamental change in the application of a rule can only be achieved through a rule amendment promulgated through a notice-and-comment proceeding or through a specific expression that the Commission would forebear from enforcing that rule. Further, in view of the fact that the acceptance notice for the second-round applications was released only ten weeks ago, it would be premature for the Commission to now enforce restrictions on the second-round applicants that could substantially limit their ability to negotiate a resolution of orbital location assignments.

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<sup>10</sup> *Id.* at 11.

*Milestone Enforcement.* The KaStar Companies also take issue with Pegasus' proposal to alter the milestone schedule for Ka-band licensees that do not yet have milestone schedules because of the absence of ISL spectrum.<sup>11</sup> According to Pegasus, the Commission should require KaStar to certify compliance with one-year and two-year milestones on the true dates rather than in the June 30 annual report. Here again, Pegasus proposes to amend Commission rules so that they apply only to certain first-round Ka-band licensees in a manner that is more restrictive than existing rules require. This would be a patent violation of the notice-and-comment procedures established in the Administrative Procedure Act.<sup>12</sup>

*International Coordination.* Pegasus further asks the Commission to issue a declaratory ruling that first-round licensees that are "unable" to coordinate the use of their orbital locations should not be permitted to take priority over second-round applicant to second-round licensees.<sup>13</sup> Pursuant to Section 1.2, the Commission may issue a declaratory ruling "terminating a controversy or removing uncertainty." In this case, there is no controversy or uncertainty. As stated in the Orders granting the first-round authorizations, all licensees are required to participate in international coordination and obtain no interference protection rights unless coordination is

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<sup>11</sup> *Id.* at 13-14.

<sup>12</sup> See Administrative Procedure Act, 5 U.S.C. §551, *et seq.* (1966). Pegasus improperly construes the provisions of Section 25.145(g) to require licensees to demonstrate compliance with the implementation milestone schedule. In fact, Section 25.145(g) requires licensees to report the "[s]tatus of space station construction and anticipated launch date, including any major problems or delays encountered." Section 25.145(f), which specifies the milestones for construction commencement and launch, does not require licensees to submit any report demonstrating compliance with such milestones.

<sup>13</sup> Pegasus Petition at 14.

completed. This requirement is clear, indeed, much more clear than Pegasus' request to have the Commission determine when and if a licensee is "unable" to complete international coordination.<sup>14</sup>

*The 93° and 103° Opinion.* Pegasus' request to have the Commission issue its order concerning the 93° W.L. and 103° W.L. orbital locations also is procedurally misplaced.<sup>15</sup> Pegasus should either have petitioned for reconsideration of the order revising the orbital assignment plan (or filed comments in that proceeding), or can seek reconsideration, to the extent necessary when the Commission releases its opinion.<sup>16</sup> Alternatively, Pegasus can file a request with the Commission requesting issuance of the opinion. Regardless, making such a request under the caption of the *Third Report and Order* rulemaking proceeding is inappropriate.

*Changes to Milestone Schedule.* Finally, Pegasus asks the Commission to initiate a rulemaking proceeding to establish more stringent milestone schedules for the first-round Ka-band licensees.<sup>17</sup> Aside from the obvious attempt for Pegasus to single out the first-round licensees, Pegasus must file a petition for rulemaking for the Commission to fairly consider its request.

## **II THE PETITION IS SUBSTANTIVELY DEVOID OF MERIT.**

The KaStar Companies will not at this time offer comments on each of the arguments raised by Pegasus. However, there are two issues that could affect the KaStar Companies directly and in a significant manner that must be addressed at this time.

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<sup>14</sup> See Part II.A., *infra*.

<sup>15</sup> See Pegasus Petition at 15.

<sup>16</sup> See *Order*, 12 FCC Rcd 22004 (1997), which reassigned certain orbital locations to address AT&T's abandonment of its orbital slots at 93° W.L. and 103° W.L.

<sup>17</sup> See Pegasus Petition at 15.

**A. The Commission Should Not Impose Restrictions On First-Round Licensees That Are "Unable" To Complete International Coordination.**

In its Petition, Pegasus asks the Commission to limit the priority rights of first-round applicants that are unable to complete international coordination. This proposal would materially alter the obligations of the first-round licensees, fails to consider the realities of coordinating with foreign governments and licensees and implementation would require the Commission to engage in dangerous line-drawing. In short, Pegasus' proposal is a solution in search of a problem, and must be rejected outright.

First, Pegasus ignores the obligations of the KaStar Companies and the other first-round licensees. The *KaStar Authorization* requires the KaStar Companies to complete consultations under Article XIV of the INTELSAT Agreement and to prepare any necessary submissions to the International Telecommunication Union ("ITU") and to affected administrations for the completion of the appropriate coordination and notification obligations.<sup>18</sup> In addition, the Commission stated that "[w]e also remind our licensees that no protection for interference caused by radio stations authorized by other Administrations is guaranteed unless coordination procedures are timely completed or, with respect to individual administrations by successfully completing coordination agreements."<sup>19</sup> These obligations make clear that the KaStar Companies must either complete coordination, undertake substantial risk of causing or receiving harmful interference or face loss of the authorization. Given the large capital investment necessary to construct and launch Ka-band satellites, these obligations provide sufficient incentive for all first-round licensees to successfully

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<sup>18</sup> See *KaStar Authorization* at 12.

<sup>19</sup> *Id.*

complete international coordination.

Second, Pegasus fails to consider the realities associated with international coordination. Coordination procedures are initiated through the ITU under strict procedures that establish priorities among licensees for interference protection. The FCC, through its delegation, is primarily responsible for sending materials to the ITU and negotiating with foreign administrations. Licensees are obligated to comply with the formalities of both the ITU filing process as well as participate in the nation-to-nation coordination meetings. As a practical matter, whether a licensee is able to successfully complete coordination is subject to the auspices of the ITU, the FCC and foreign administrations and, unlike cellular contour extension agreements or MDS market coordination agreements, the success of these agreements is largely dictated by third parties.<sup>20</sup>

Third, Pegasus leaves many questions unanswered. How will the Commission define the term "unable?" At what point would a licensee be deemed "unable" to complete coordination? At what point is coordination deemed completed? How would the second-round applicants and licensees obtain priority? Answers to these questions require the Commission to carefully consider and adopt definitions and procedures that necessarily will be unclear and subject to further interpretation. Contrary to Pegasus' expectations, this process undoubtedly will add to the uncertainty of the second-round participants.

Finally, Pegasus' proposal is arbitrary and capricious. Pegasus would apply the coordination restrictions only to first-round licensees, which have been working diligently to

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<sup>20</sup> As an example, in at least one case of which KaStar is aware, a foreign government postponed indefinitely coordination meetings that had been scheduled between Ka-band licensees.

complete coordination, and would not seek to apply similar rules to second-round licensees. This is nothing more than a transparent attempt to single out the pioneers that had the foresight to apply in the first round.

**B. The Commission Should Not Alter Its Implementation Milestone Schedule.**

Pegasus urges the Commission to initiate a rule making proceeding to adopt more stringent milestone requirements for first-round licensees.<sup>21</sup> Although a detailed discussion on this proposal is better left for comments in a rule making proceeding (if and when initiated), the KaStar Companies strongly believe that there is no basis whatsoever for the Commission to consider Pegasus' arguments.

The purpose of Section 25.145(f) is to curtail warehousing of satellite spectrum. It logically follows, then, that these milestones should only be tightened where there is evidence of warehousing that the existing rule does not adequately prevent. This is simply not the case. As explained above, the KaStar Companies have taken substantial steps to design, finance, construct and launch its satellite system. These activities strongly suggest that there is no need for the Commission to modify the milestone schedule, especially considering that the KaStar Companies are not even subject to an implementation milestone schedule.

Moreover, Pegasus' reliance on *Norris* as the basis for requiring first-round licensees with milestones to be subject to compliance demonstrations is misplaced.<sup>22</sup> In *Norris*, at the specific request of another Ka-band party, the Commission requested Norris to submit evidence of its

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<sup>21</sup> See Pegasus Petition at 15.

<sup>22</sup> See *Norris Satellite Communications, Inc.*, 10 CR 158 (1997) ("*Norris*").

construction progress only after the Commission had granted several extensions of time and progress reports indicated that construction might not have advanced in compliance with the milestone requirements. Here, Pegasus would have the FCC issue compliance letters without any evidence that licensees were not meeting their milestone requirements. It would a far better use of the Commission's limited administrative resources if the Commission were to issue such letters only upon receipt of evidence demonstrating that the licensee in question may not be in compliance with its milestone schedule.

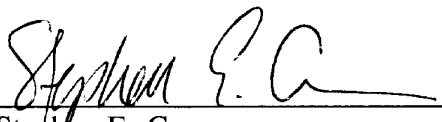
### **Conclusion**

In view of the foregoing, the KaStar Companies oppose Part I of the Petition for Expedited Action filed by Pegasus Development Corporation.

Respectfully submitted,

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I, LaJuan A. Simmons, do hereby certify that I have on this 3rd day of June, 1999, mailed by first-class United States mail, postage prepaid, copies of the foregoing **“OPPOSITION TO PETITION FOR EXPEDITED ACTION”** to the following:

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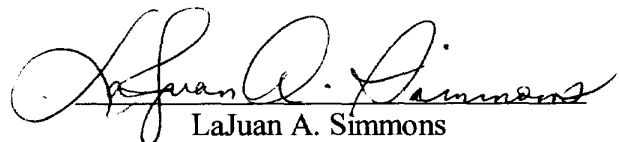
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